In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 297

ALEX CARL SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This suit was brought by petitioner under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, alleging that officers of the United States Department of Justice had "negligently and wrongfully" failed adequately to investigate or prosecute certain civil rights demonstrators who were picketing his store in Albany, Georgia, in violation of federal law.[1] The district court granted the motion of the United States to dismiss the complaint on the ground that any tort that

[1] In fact, however, a grand jury did investigate the picketing. See *Rabinowitz* v. *United States*, 366 F. 2d 34, 80–82 (C.A. 5).

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might be alleged herein was excluded from the coverage of the Tort Claims Act by the "discretionary function" exception, 28 U.S.C. 2680(a), and by the "interference with contract rights" exception, 28 U.S.C. 2680(h). The court of appeals affirmed on the ground that the acts alleged were within the "discretionary function" exception (Pet. App. 11–22).

It has long been settled that the initiation of federal criminal investigations and prosecutions are matters wholly committed to the discretion of the Attorney General or other government authorities,[2] and that the exercise of this discretion is not subject to review by the courts.[3] Consequently, the exception in the Federal Tort Claims Act, 28 U.S.C. 2680(a), for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty * * *, whether or not the discretion involved be abused," is clearly applicable to petitioner's claim. Cf., *Dalehite* v. *United States*, 346 U.S. 15, 34, 35–36.[4] The court of appeals was therefore

[2] *E.g.*, *Confiscation Cases*, 7 Wall. 454, 457; *United States* v. *Thompson*, 251 U.S. 407, 412–413; *Deutsch* v. *Aderhold*, 80 F. 2d 677, 678 (C.A. 5); *District of Columbia* v. *Buckley*, 128 F. 2d 17, 20 (C.A.D.C.), certiorari denied, 317 U.S. 658; *United States* v. *Woody*, 2 F. 2d 262 (D. Mont.).

[3] *E.g.*, *Moses* v. *Katzenbach*, 342 F. 2d 931 (C.A.D.C.), affirming *Moses* v. *Kennedy*, 219 F. Supp. 762 (D.D.C.); *Powell* v. *Katzenbach*, 359 F. 2d 234 (C.A.D.C.), certiorari denied, 384 U.S. 906, rehearing denied, 384 U.S. 967; *Goldberg* v. *Hoffman*, 225 F. 2d 463 (C.A. 7); *United States* v. *Cox*, 342 F. 2d 167, 171, 178–179, 182, 190–191 (C.A. 5), certiorari denied, 381 U.S. 935; *United States* v. *Faneca*, 332 F. 2d 872, 875 (C.A. 5); *Pugach* v. *Klein*, 193 F. Supp. 630 (S.D.N.Y.).

correct in holding that petitioner's claim was expressly exempted from the coverage of the Tort Claims Act, and further review is not warranted.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JULY 1967.

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[4] None of the cases relied upon by petitioner (*United States* v. *Muniz*, 374 U.S. 150; *Indian Towing Co.* v. *United States*, 350 U.S. 61; *Rayonier, Inc.* v. *United States*, 352 U.S. 315) involved claims based upon a clearly discretionary activity, such as involved here. Moreover, in *Muniz* the Court held only that federal prisoners were not barred as such from maintaining actions under the Tort Claims Act; the Court expressly declined to consider the applicability of the discretionary function exception to the facts presented (374 U.S. at 163).

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